

United States Court of Appeals  
For the Ninth Circuit

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FIREMAN'S FUND INSURANCE Co., a Corporation,  
*Appellant,*  
vs.

JAMES G. MULROY, as Administrator of the  
Estate of Oscar Carl Johnson, Deceased, and  
UNITED STATES OF AMERICA, *Appellees.*

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JAMES G. MULROY, as Administrator of the  
Estate of Oscar Carl Johnson, Deceased,  
*Cross-Appellant.*  
vs.

FIREMAN'S FUND INSURANCE Co., a Corporation,  
and UNITED STATES OF AMERICA, *Appellees.*

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UPON APPEAL FROM THE UNITED STATES DISTRICT  
COURT OF THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

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**PETITION FOR REHEARING OF JAMES G. MULROY,  
AS ADMINISTRATOR OF THE ESTATE OF  
CARL JOHNSON, DECEASED**

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JAMES G. MULROY,  
*Proctor for Appellee and  
Cross-Appellant.*

**FILED**

3012 Arcade Building,  
Seattle 1, Washington.

**JAN 31 1952**



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Appellant,

vs.

JAMES G. MULROY, as Administrator of the Estate of Oscar Carl Johnson, Deceased, and UNITED STATES OF AMERICA,  
Appellees.

No. 12755

JAMES G. MULROY, as Administrator of the Estate of Oscar Carl Johnson, Deceased,  
Cross-Appellant,

vs.

FIREMAN'S FUND INSURANCE CO., a Corporation, and UNITED STATES OF AMERICA,  
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

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## **PETITION FOR REHEARING OF JAMES G. MULROY, AS ADMINISTRATOR OF THE ESTATE OF CARL JOHNSON, DECEASED**

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*To: The Honorable Judges of the United States Court of Appeals, Ninth Circuit:*

With reference only to reversal of judgment against Fireman's Fund, the undersigned petitioner hereby respectfully petitions for rehearing of the above entitled cause, heretofore heard by this court September 13, 1951, and decided January 2, 1952, upon appeal

from a judgment of the District Court of the United States, Western District, Northern Division, dated August 31, 1950, in Admiralty Cause No. 14918, upon the following grounds::

It appears to petitioner, that the Court of Appeals has decided he is not entitled to recover judgment against defendant, Fireman's Fund, because:

- a. Payment for losses if any, under war risk insurance policy No. 6622, issued by said company was payable solely to American Mail Line, Ltd., for distribution by it in *accordance with agreement made with each seaman concerned*.
- b. Your petitioner was not a seaman as mentioned, and had no capacity as personal representative of a deceased seaman or otherwise, to recover judgment under said policy, against Fireman's Fund, regardless of any insurance coverage effected by that policy.
- c. Petitioner's pleadings were defective as to parties, American Mail not having been made a party to the action brought against Fireman's Fund to recover insurance proceeds upon loss of life by Oscar Carl Johnson, a deceased seaman.

### **Discussion**

The above indicated defense was never tendered in the trial court by Fireman's Fund, its apparent theory being that under the policy there might be a liability payable to the deceased seaman's personal representative or next of kin, had not Johnson ceased to be a member of the "Capillo's" crew prior to destruction of that vessel, but that in any event, his death was not due to war perils covered by the policy.

Fireman's Fund, itself, never challenged the libel, or joined in any challenge thereto either as to petitioner's capacity to sue, or as to any defect of parties in this litigation, and it is petitioner's present contention that these matters may not now properly be brought in or considered upon appeal.

It should be noted, that the contract entered into under shipping articles between American Mail and the crew of the "Capillo" provided, among other things (listed in rider, Appellant's Exhibit No. 3) that the steamship company was obligated to "carry" war risk insurance against loss of life as a result of war perils. Policy No. 6622 was procured in compliance with that provision, and under it Fireman's Fund specifically took "*upon itself the burden of such insurance \* \* \**" (Ap. 47), but at all times since Johnson's death the insurer has disclaimed responsibility thereunder, has refused to pay anything either to American Mail or otherwise, and instead has defended in this litigation upon grounds other than petitioner's presently alleged incapacity to sue, or defects in parties here impleaded.

The court's present ruling that payment for losses under Policy No. 6622 cannot be enforced by a personal representative or heir at law of an insured deceased seaman whose death was or many have been, covered by the contract of insurance, effectively destroys the contract between Johnson and American Mail, created by the shipping articles and rider thereto.

Your petitioner recalls no evidence in reference to what, if any agreement, was executed between John-

son and American Mail for distribution of insurance proceeds in the event of Johnson's death. Inasmuch as American Mail has no interest in any funds payable to it upon maturity of Policy No. 6622, its legal status thereon is no more than that of prospective, or contingent trustee, to receive and distribute to the assured, or ultimate payees, such money as might come into its possession from payments made by Fireman's Fund, upon deaths due to war perils, of insured members of the "Capillo's" crew, for the benefit either of their estates, next of kin or other designated beneficiaries. Because of that situation, American Mail was not a necessary party litigant in this action. To enforce payment, any beneficiary under a matured employee's group life insurance policy may bring suit directly against the insurer. This seems particularly true where an insurer, in terms of its policy, has taken upon itself the burden of insurance, and thus, by implication at least, has relieved the employer of responsibility therefor.

In this matter your petitioner further respectfully, but urgently, requests this Honorable Court that he be permitted to file herein a brief in which more detailed argument and citation of legal authority to support his present petition may be fully presented.

Respectfully submitted,

JAMES G. MULROY,  
Petitioner.

**CERTIFICATE**

I, the undersigned petitioner, and counsel for petitioner hereby certify that in my judgment the foregoing petition is well founded, that it is seriously presented for consideration and is not interposed for delay.

JAMES G. MULROY,  
Petitioner and Attorney for Petitioner.

